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In The

Supreme Court of the United States

October Term, 1993

RICHARD M. CLEWIS, III and THE TAKE BACK TAMPA POLITICAL COMMITTEE,

Petitioners,

v.

ROBIN C. KRIVANEK, as the Hillsborough County Supervisor of Elections,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Florida

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

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ARGUMENT

The Respondent is haunted by two critical facts in this case. First, she used an innocuous administrative purge statute that says nothing about the loss of petition speech rights, to deny an entire class of registered voters their First Amendment right to petition the government. Second, when election supervisors are empowered with unbridled discretion to time such a purge, they are endowed with censorship rights over referendum petitions. These facts cannot be explained away. The use of such governmental power cannot be justified.

This Court need not look any further to understand why the Respondent began her Brief in Opposition with two specious arguments about "standing", rather than confront the constitutional issues head on. As Petitioners will show, the Respondent's standing arguments are non-issues, conjured up in an attempt to divert the Court's attention from the serious constitutional questions presented.

I.

PETITIONERS HAVE STANDING

The Petitioner, Take Back Tampa Political Committee ("the Committee"), was formed pursuant to Fla. Stat. Section 100.361 (1)(a) (1990) (Reply App. p. A1) to circulate a referendum petition to repeal a city ordinance. (App. pp. A31 and A77).[1] Pursuant to that statute, a committee shall be designated when circulating a recall

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[1] The Tampa City Charter provides that the procedures for referendum shall be governed by the state-wide procedures for recall petitions. Fla. Stat. Section 100.361 governs the procedures for recall petitions.

petition. The statute also provides that the "Committee" consists of " . . . **those signing the . . . petition.**" *Id.*, (emphasis added.) Accordingly, everyone who signed the Committee's petition is part of, and represented by, the Committee.

The Committee members whose petition signatures were rejected because they were placed on the inactive registered voters list were injured by the denial of their First Amendment rights to petition the government and to engage in political expression through the petition process. They have standing to sue in their own right. The petition and speech interests that the Committee seeks to protect are germane to the Committee's purpose of petitioning the government for a referendum. Moreover, participation of individual members in this lawsuit is not required for the claim asserted and relief requested. The Committee, therefore, has associational standing to sue on behalf of these Committee members. *International Union, United Auto v. Brock*, 477 U.S. 274, 282 (1986).

The Committee also has organizational standing to sue for a "concrete and demonstrable injury to its activities." *Havens Realty Corp v. Coleman*, 455 U.S. 363, 379 (1982); *New Progressive Party v. Hernandez Colon*, 779 F. Supp. 646, 651 (D. Puerto Rico 1991). The Committee's purpose and primary activity was to circulate a petition among the people of the City of Tampa to bring to a referendum the repeal of a city ordinance. (App. pp. A31 and A77). The Committee's activities suffered an injury when the government excluded the signatures of an entire class of registered voters from the Committee's petition. As a result of this exclusion, the petition did not contain sufficient signatures to cause City Council to reconsider the ordinance or to place the ordinance on the

ballot for a referendum. (App. pp. A4, A32 and A83-A84).[2]

Fla. Stat. Section 100.361 (1)(a) also requires that a Committee chairman be designated "to act for the committee". The Petitioner Clewis is the Committee chairman who, pursuant to statute, has been and is acting for the "Committee" (App. pp. A31-A32), which statutorily includes everyone who signed the petition.

Clewis also has standing to challenge the deprivation of his own First Amendment rights. By unnecessarily excluding the valid signatures of other registered voters, the Respondent burdened the speech rights of Clewis by making it more difficult to obtain enough support to put the referendum on the ballot. This Court held in *Meyer v. Grant*, 486 U.S. 414, 423 (1988) that government prohibitions which have the effect of reducing the total quantum of speech on a public issue in the context of an initiative petition are subject to exacting scrutiny.[3]

Clewis also has standing because the Florida Supreme Court held that petition circulators such as Clewis were "biased advocates" who could not deliver

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[2] The exclusion of these signatures also creates a drain on the Committee's resources because it forces the Committee to conduct another petition drive at an enormous cost to the Committee. In addition to the resources required to circulate a petition in a large city, the Committee had to pay the Respondent ten cents for every petition signature checked. Fla. Stat. Section 100.361 (1)(h) (1990) (Reply App. A1).

[3] By denying petition rights to others who sought to sign Clewis' petition, the Florida Supreme Court also denied Clewis his First Amendment right to associate with those persons for the advancement of his political beliefs. *Williams v. Rhodes*, 393 U.S. 23, 30 (1968).

effective reinstatement notices and thereby reinstate inactive voters and qualify them to sign the petition. (App. p. A10). This burden on Clewis' speech rights is content based and similar to the prohibition against payments to petition circulators which this Court struck down in *Meyer.*

Even if Clewis' rights had not been injured, he would have standing under the overbreadth doctrine. *New York v. Ferber,* 458 U.S. 747, 768-769 (1982); *Virginia v. American Booksellers Association, Inc.,* 484 U.S. 383, 392-393 (1988) (in the First Amendment context, litigants are permitted to challenge a statute even if their own rights of free expression are not violated). The overbreadth of the purge statute in this case is substantial. In the name of protecting against fraud, the statute denies fundamental petition and speech rights to inactive registered voters whose names, signatures and registration information are in the government's records and available to verify the validity of petition signatures. This is the same information used to verify petition signatures of active registered voters. Clewis has standing to attack such an overly broad statute.

The second prong of the Respondent's standing challenge is that the referendum petition would have failed, even if the signatures of inactive registered voters had been counted. (Brief in Opp. pp. 7-8). Respondent's argument fails because it is built upon the false premise that the voters counted in March, 1991 to determine the quantity of signatures required on the petition did not include the inactive registered voters who were purged on June 21, 1991.

The 25,000 voters placed on the inactive list on June 21, 1991 (Brief in Opp. p. A2). necessarily were on the list

of active registered voters before they were purged. As active voters in March of 1991, these 25,000 voters were counted in the 123,093 figure used by the Respondent to calculate the number of signatures required to certify the referendum petition, i.e., 10% of 123,093 voters. (App. p. A78). Accordingly, the Respondent's claim on page 8 of her Brief, that these voters were not counted in determining the number of signatures required for the petition, is patently erroneous. If the 25,000 registered active voters who were put on the inactive list on June 21, 1991 had not been counted in the March 1991 count, then the Petitioners would have needed only 9,803 signatures on the petition, i.e., 10% of 98,023 voters.[4]

The Respondent's argument, though flawed, serves a useful purpose because it helps to show how the Respondent inequitably applied the voter purge statute against the Petitioners in this case. By excluding the signatures of inactive registered voters from the petition, many persons who were counted to determine the quantity of petition signatures required were not counted in determining whether that requirement was met. The pool of persons available to the Committee to sign the petition after the June 21 purge was 25,000 persons smaller than the pool of persons included in the March 1991 count to determine the number of petition signatures required. If this Court restores the petition rights of the inactive registered

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[4] The Petitioners collected 12,130 petition signatures, excluding signatures of inactive registered voters; far more than the 9,803 that would have been needed if the voters put on the inactive list in June had not been included in the count of voters as of March 1991. (App. p. A74).

voters, then this inequity will be corrected and the petition will contain sufficient signatures to meet the signature requirement of the City Charter. Moreover, regardless of the success of this petition, individual petition and speech rights will be vindicated.

II.

RESPONDENT HAS FAILED TO RECONCILE THE CONFLICT BETWEEN THE FLORIDA SUPREME COURT'S OPINION AND THIS COURT'S OPINION IN *MEYER V. GRANT*

Respondent seeks to avoid review by this Court by casting this ban on petitioning by inactive registered voters as simply a "minimal" intrusion on non-fundamental rights that need not be subjected to strict scrutiny. Relying on lower court cases decided before *Meyer*, (Brief in Opp. pp. 9, 10 and 13), Respondent urges this Court to test this ban on petitioning and speech rights under the "rationally related" test.[5] The Florida Supreme Court utilized this lower standard even though the court recognized that First Amendment petition and speech rights

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[5] Respondent also relied on two cases decided after *Meyer*. *Hoffman v. State of Md.*, 928 F.2d 648 (4th Cir. 1991) is distinguishable because it did not involve petition rights or political expression through the petition process. *Taxpayers United for Assessment Costs v. Austin*, 994 F.2d 291 (6th Cir. 1993), to the extent it applied a lower standard of review, conflicts with this Court's decision in *Meyer* and the decisions in *Delgado v. Smith*, 861 F.2d 1489 (11th Cir. 1988); *cert. denied*, 492 U.S. 918 (1989); *Wyman v. Secretary of State*, 625 A.2d 307 (Me. 1993); *Lloyd Corp. v. Whiffer*, 849 P. 2d 446 (Oregon 1993) and *Committee For Better Health Care v. Meyer*, 830 P. 2d 884 (Colo. 1992). This Court should grant certiorari review to resolve these conflicts.

were at issue.[6] The Florida Supreme Court's obvious departure from the strict scrutiny standard mandated in *Meyer* cries out for review by this Court.

To support her view that First Amendment rights are not at issue here, Respondent quotes language from pre-*Meyer* cases, stating that First Amendment rights are not implicated by petitions to the government made through referendum petitions. (Brief in Opp. p. 12). Several post-*Meyer* cases, however, directly hold, based upon *Meyer*, that initiative petitions are "core political speech" protected by the First amendment. The court in *Delgado v. Smith*, 861 F.2d 1489, 1490 (11th Cir. 1988); *cert. denied*, 492 U.S. 918 (1989) upheld a District Court's order dismissing a complaint which sought to enjoin an election on a citizen initiative to amend Florida's constitution. The Eleventh Circuit, citing this Court's decision in *Meyer*, described initiative petitions as "core political speech" that raise "serious First Amendment questions". *Delgado*, 861 F.2d at 1494-1495. Significantly, this Court denied certiorari review. 492 U.S. 918 (1989).

The Supreme Courts of Maine, Oregon and Colorado, relying on *Meyer*, similarly have held that initiative petitions are "core political speech" protected by the First Amendment. *Wyman v. Secretary of State*, 625 A.2d 307, 311 (Me. 1993); *Lloyd Corp v. Whiffer*, 849 P.2d 446, 458-459 (Oregon 1993); *Committee for Better Health Care v. Meyer*, 830 P.2d 884, 890 fn. 7 (Colo. 1992). The Court in *Wyman* explicitly held "[t]he initiative petition process involves

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[6] The Florida Supreme Court described the petition right at issue here as "a form of democratic **expression** derived from the First Amendment . . . " and a means of preserving the First Amendment right to petition the government for redress of grievances. (App. pp. A7-A8; emphasis added).

political discourse that is protected by the first amendment of the federal constitution." *Wyman*, 625 A.2d at 311, citing *Meyer*, 486 U.S. at 421. The State Supreme Courts in *Committee for Better Health Care* and *Wyman* obeyed this Court's mandate in *Meyer* and held that restrictions on the right to undertake an initiative are "tested by the application of the standard of strict scrutiny" and "subject to exacting scrutiny, must be justified by a compelling state interest and be narrowly tailored to serve that interest." *Committee for Better Health Care*, 830 P.2d at 890 fn.7; *Wyman*, 625 A.2d at 311. The Florida Supreme Court's obvious refusal to obey that mandate in this case is the primary reason why this Court should grant certiorari review.

Respondent tries to shift the blame for the denial of these fundamental speech and petition rights to the Petitioners, arguing that the inactive registered voters caused the loss of their own rights by failing to send a reinstatement card to her. (Brief in Opp. p. 15). This assertion incorrectly assumes that these voters knew in advance that they would lose their rights in sufficient time to prevent the loss. They did not. Neither the purge statute nor the reinstatement card gave notice that these First Amendment rights would be lost. Registered voters, therefore, would not perceive any need to return a reinstatement card to the Respondent to preserve these First Amendment rights.[7]

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[7] They likely would not return a reinstatement card to preserve voting rights either. Under Florida Law, inactive registered voters can still vote for an additional three years after an administrative purge by simply filling out a form at the polls on election day. (App. pp. A24 and A67).

This lack of advance notice that rights would be lost distinguishes this case from *Rosario v. Rockefeller,* 410 U.S. 752 (1973) and the other cases relied upon by the Respondent, in which disenfranchised voters knew that they would lose their eligibility to vote and had sufficient opportunity to obtain such eligibility prior to the election date. The Respondent did not disclose that she was excluding the signatures of registered voters placed on the inactive list until after the petition drive was over. At that point, the Petitioners were barred by statute from adding any signatures to their petition. Fla. Stat. Section 100.361 (1)(a) and (h) (1990). Thus, the inactive registered voters were powerless to exercise their First Amendment rights to petition and engage in political speech in this petition drive. Respondent further burdened these rights by refusing to accept signed, verified petitions as de facto reinstatement notices that would restore voters to active status and thereby restore their petition and speech rights.

The Respondent has not met her burden of demonstrating that the voter purge statute used in this case to censor "core political speech" is narrowly drawn and "necessary" to further a compelling state interest. *Meyer,* 486 U.S. at 421-422 and 426. Given that the purge statute "trenches upon an area in which the importance of First Amendment protections is 'at its zenith'," the Respondent's burden to justify this statute is "well-nigh insurmountable". *Meyer,* 486 U.S. at 425.

III.

AN ARBITRARILY TIMED PURGE CENSORS POLITICAL SPEECH MADE THROUGH THE PETITION PROCESS

Finally, the Respondent's argument that the purge was routinely timed (Brief in Opp. pp. 16-17) is entirely inaccurate and unsupported. Respondent testified that she lacked any personal knowledge as to when she had conducted previous purges and there is no evidence that other supervisors routinely time their purges. (Brief in Opp. p. A3). The unbridled discretion given to Respondent and other election supervisors to conduct such purges, at any time during an odd numbered year, permits them to squelch core political speech by timing the purge to coincide and interfere with pending petition drives. This Court has never tolerated empowering government officials with unbridled discretion to censor political speech. *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S 750, 764 (1988). Certiorari review should be granted.

Respectfully submitted,

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APPENDIX A

100.361 Municipal Recall

(1) RECALL PETITION . . .

(a) . . . Electors of the municipality or district making charges contained in the statement of grounds for recall and those signing the recall petition shall be designated as the "committee." A specific person shall be designated in the petition as chairman of the committee to act for the committee. Electors of the municipality or district are eligible to sign the petition. Signatures and oaths of circulators shall be executed as provided in paragraph (c). All signatures shall be obtained within a period of 30 days, and the petition shall be filed within 30 days after the date the first signature is obtained on the petition . . .

(h) Within 60 days after delivery of the "Recall Petition and Defense" to the chairman, the chairman shall file with the clerk the "Recall Petition and Defense" which bears the signatures of electors. The clerk shall assemble all signed petitions, check to see that each petition is properly verified by the oath of the circulator, and submit such petitions to the county supervisor of elections, who shall determine the number of valid signatures, purge the names withdrawn, certify within 30 days whether 15 percent of the qualified electors of the municipality have signed the petitions, and report his findings to the governing body. The supervisor shall be paid by the persons or committee seeking verification the sum of 10 cents for each name checked.

Relevant portions of Fla. Stat. Section 100.361 (1)(a) and (h) (1990).